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IN THE SUPREME COURT OF THE STATE OF UTAH

OCTOBER TERM, 1944

No. 1037

THE STATE OF UTAH,

Respondent,

vs.

ALBERT EDMUND BARLOW, MORRIS QUINCY KUNZ, DAVID BRIGHAM DARGER, IANTHUS WINFORD BARLOW, DR. RULON CLARK ALLRED, OSWALD BRAINICH, EDMUND F. BARLOW, ARNOLD BOSS, HEBER KIMBALL CLEVELAND, LOUIS ALMA KELSCH, JOHN YATES BARLOW, JOSEPH WHITE MUSSER, JOSEPH LYMAN JESSUP, ALMA ADELBERT TIMPSON, CHARLES FREDERICK ZITTING,

Appellants.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States as amended, the foregoing named defendants and appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final decision and judgment of the Supreme Court of the State

of Utah entered in this cause on December 1, 1944, affirming the judgment of the District Court of Salt Lake County, State of Utah, convicting the said appellants, and the denial of the petition for rehearing thereon entered on the 5th day of February 1945. Petition for allowance of said appeal was filed on February 5, 1945, and is presented to the Supreme Court of the State of Utah herewith, to wit, the 6 day of February, 1945.

I

Jurisdiction

The jurisdiction of the Supreme Court of the United States to review the judgment and decision entered in this cause is conferred by Act of Congress of March 3, 1911, as amended by Act of February 13, 1925, C. 229, 43 Stat. 937, 28 U. S. C. A. paragraph 344 (Judicial Code, Section 237, Amended) commonly known as "Appellate jurisdiction of decrees of State courts: certiorari".

II

The Statute, the Validity of Which Is Involved

The statute of the State of Utah, the validity of which is involved, is Sec. 103-51-2, Compiled Laws of Utah, 1943, which reads as follows:

Sec. 103-51-2, supra, reads:

> "If any person cohabits with more than one person of the opposite sex, such person is guilty of a felony.
>
> "Any person, except the defendant, may be compelled to testify in a prosecution for unlawful cohabitation; *provided, however,* that the evidence given in such prosecution shall not be used against him in any proceeding, civil or criminal, except for perjury in giving such testimony. A person so testifying shall not thereafter be liable to indictment, prosecution, or punish-

ment for the offense concerning which such testimony was given."

The treaty conferring rights that this decision ignores is as follows:

Treaty of Peace (Etc.) of Guadalupe Hidalgo February 2, 1848, between Republic of Mexico and the United States (7 Fed. Stat. Ann. p. 694-703):

> "Article IX: "The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article shall be incorporated into the Union of the United States and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction."

III

Judgment and Decision Involved

The decision involved is that rendered by the Supreme Court of the State of Utah on December 1, 1944, which opinion is made a part hereof, together with the opinion denying the petition for rehearing thereof.

All fifteen of the appellants were prosecuted in the District Court of Salt Lake County, State of Utah, under information charging unlawful cohabitation, identical in wording (except as to respective names); and all of their cases were submitted to the Court sitting without a jury on a *stipulation concerning what "the State's Testimony which would, were it not for this stipulation be introduced by the State."* Thereupon the following was stipulated as being

the State's testimony: identical in all cases (except as to respective names):

> "That the said Albert Edmund Barlow on and between October 14, 1941, and the 1st day of March, A. D. 1944, at the County of Salt Lake, State of Utah, did cohabit with more than one person of the opposite sex, to-wit: With Amanda Kate Kilgrow, Vic Frazer, Marine Owen; and that said association was based on the belief of the said defendant and the women in the divinity of the Doctrine and the Covenants of the Church of Jesus Christ of Latter-day Saints (exclusive of the Manifesto). No testimony was offered concerning sexual intercourse of the defendant with said women."

The appellants having entered their pleas of "not guilty" were on said stipulated testimony nevertheless found guilty of unlawful cohabitation and sentenced to five years each in the State penitentiary. Since the informations and stipulations were identical except as to names the cases were consolidated for appeal.

Both in the lower Court by motions to quash and in the Supreme Court of the State of Utah by assignments of error and on petition for rehearing, in fact, even before the committing magistrate, the appellants urged that their rights and immunities under the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States were being violated, and it is upon such ground that the jurisdiction of the Supreme Court of the United States on appeal is herein invoked. Motion to quash, assignments of error, and appellants' brief all raised those Constitutional questions.

The appellants throughout the cause had a right to due process of law as set forth in the First, Fifth, Sixth and Fourteenth Amendments to the Federal Constitution; and it is here maintained that a presumption of innocence in an

accused is one of the basic principles of the law of the land. The judgment of the lower Court and that of the Supreme Court of Utah presumed that the word "cohabit" as set forth in the stipulation had only *one* meaning, to wit a guilty one as used in both the statute and the stipulations, whereas in truth the word is equally one of innocent import, standing alone without proof. Further, these defendants, at every stage of the proceedings have severally claimed the protection of Article 9 of the Treaty of Guadalupe-Hidalgo; the Supreme Court of Utah, ruling on that point, has held the claim to be untenable, and so has recognized the Federal question so presented, and passed upon it, to the prejudice of the defendants, and each of them.

IV

Cases Sustaining Jurisdiction

In cases brought to this court from state courts for review, *on the ground that a Federal right set up in the state court has been wrongly denied,* and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact, or has been waived, or lost, this court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here.

Kan. City Southern R. Co. v. Albers Commission Co., 223 U. S. 573, 32 S. Ct. 316.

The omission of the state court below *to pass upon certain evidence and to make findings of fact thereon,— does not relieve the federal Supreme Court, on writ of error, of the duty of examining the evidence* for the purpose of determining what the facts reasonably might be and presumably would be found therefrom by the state

court if the plaintiff in error's contention upon the question of the federal law should be sustained, and the facts thereby shown to be material.

Merchants Natl. Bk. v. Richmond, 256 U. S. 635, 41 S. Ct. 619.

In the following cases the Court based its jurisdiction on whether or not the defendants in the State Court had in the court of their trials been denied a presumption of innocence and hence due process of law.

Howard v. *Fleming,* N. C. 1903, 24 S. Ct. 49, 191 U. S. 137, 48 L. Ed. 121;

Great Atlantic & Pacific Tea Co. v. *Ervin,* D. C. Minn. 1938, 23 F. Supp. 70;

McFarland v. *American Sugar Refining Co.,* La. 1916, 36 S. Ct. 498, 241 U. S. 79, 60 L. Ed. 899;

Tot v. *U. S.,* Mich. & N. J. 1943, 63 S. Ct. 1241, 319 U. S. 463, 87 L. Ed. 1519;

Mobile R. Co. v. *Turnispeed,* Miss. 1910, 31 S. Ct. 136, 219 U. S. 35;

Chambers v. *State of Florida,* 60 S. Ct. 472;

Powell v. *Alabama,* 53 S. Ct. 55.

The Supreme Court, on writ of error to a state court in a case *in which the issue is whether a state statute, in its application to the facts,* which are set out in detail in the pleadings and are admitted by demurrer, *violates the Federal Constitution, must analyze the facts* as avered and draw *its own inferences as to their ultimate effect, and is not bound by the conclusion* of the highest state court in this regard.

Truax v. *Corrigan,* 257 U. S. 312, 42 S. Ct. 124.

V

The Appeal Is Timely Taken

The decision of the Supreme Court of the State of Utah, affirming that of the Court below, was rendered on Decem-

ber 1, 1944; a petition for rehearing was filed and thereafter denied on the 5 day of February 1945. A petition for appeal accompanied by assignment of errors and statement of basis of appellate jurisdiction required by Rule 12 (paragraph 1) of the Supreme Court of the United States was on the 6 day of February presented to the Hon. Martin M. Larson, Chief Justice of the Supreme Court of the State of Utah and by him allowed on the day of presentation.

VI

Finality of Judgment

The judgment forming the basis of this appeal is a final judgment by the highest Court of the State of Utah affirming a judgment of a lower Court. The judgment becomes final upon the denial of a petition for rehearing thereof.

VII

These cases present a substantial and important question in this: (a) the immediate rights of probably two thousand citizens of the state of Utah are doubtless affected by the decision, (b) the religious practice of probably half of the people of the state is affected by any interpretation of the rights they may have under their belief in the divinity of the Doctrine and Covenants, which is part of the stipulation of testimony, and of Constitutional privileges pertaining thereto; (c) it is important for the State of Utah to know whether its statute, its method of prosecution and its method of making inferences in criminal cases be violative of the Federal Constitution; and it is important to know whether or not the people of Utah acquired any religious rights under the Treaty of Guadalupe Hidalgo.

VIII

Opinion of the State Court

There are attached hereto copies of the decision of the Supreme Court of the State of Utah rendered December 1, 1944, and of the opinion denying petition for rehearing of the same, together with Table of Cases from the Utah Supreme Court holding to the exact contrary. This decision changed the law after the alleged offenses were charged.

Those cases were: *U. S.* v. *Musser*, 4 Utah 153; *U. S.* v. *Peay*, 5 Utah 263; *Cannon* v. *U. S.*, 116 U. S. 75; *State* v. *Jessup*, 98 Utah 482.

The state of Utah (Utah Code, anno. 1943) defining and proscribing polygamy reads as follows:

> "103-51-1. Polygamy.
>
> Every person who has a husband or wife living, who marries another, whether married or single, and any man who simultaneously, or on the same day, marries more than one woman, is guilty of polygamy, and shall be punished by a fine of not more than $500.00, and by imprisonment in the state prison for a term of not more than five years; but this section shall not extend to any person by reason of a former marriage whose husband or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court on the ground of nullity of the marriage contract".

The Courts below have said: The admission of a cohabitation, by these defendants, is an admission of living

in polygamy. To so declare, it is necessary to draw the following inferences:

(a) That each one of the defendants had a legal wife living, as to which there is no proof in the record;

(b) That each defendant, at the time of having a living legal wife, married another woman, or women. Of this there is no proof in the record;

(c) That each defendant, if a legal wife he had once had, (as to which there is no proof in the record), had, in fact, heard from her within five years, and did not believe her to be dead. Two inferences, and based upon the preceding one, no one of which has any support by any semblance of proof in the record;

(d) That each defendant at some time had married, legally, one or the other of the women respectively named in the respective informations, but had not had such marriage annulled or cancelled by any competent court, so inferring the utmost mala fides; so basing inference upon inference, the sole support for which is the construction by the Court of the word "cohabit", *as used in the stipulation*, and so inferring additionally an intended meaning to be given to said work by the defendants in their said use of it. So again basing inference on inference on inference, no one of which is shown by any proof whatever, present in the record; and

(e) That each defendant, had had a wife legally recognized; had married another, or others, and that no court had declared the first marriage void on the ground of the nullity of the first marriage contract, as to which no proof appears in the record, so again basing inference upon inference, without basis of proof of any kind or quality;

(f) That each defendant had, or had not, as the inference might run, married another than his legal wife, or more than one such other than his legal wife simultaneously, so again basing inference upon inference, with an entire lack of any proof appearing in the record to support any one of the same; and

(g) That each such inferred matter, was in fact, mala fide and unlawful on the part of each defendant.

Thereby, (by so drawing such unwarranted inferences, based on other unwarranted inferences, no one of which has support of any proof, and each being inferred to have been wrongful and unlawful), the court has denied to each one, and all, of these defendants due process of law, and has denied to them, and each of them, fundamental and Constitutional right to inferences, where no proof of the contrary is shown, of bona fides and lawfulness.

IX

The federal questions herein sought to be reviewed were raised in the lower trial court (The District Court of Salt Lake County, Utah) and the appellate court (The Supreme Court of the State of Utah) as follows:

1. Motion for continuance in lower court filed——— raised the question of the Treaty of Guadalupe Hidalgo and the rights under the federal constitution (R. 4). Motion denied.

2. Motion to quash the informations, filed in lower court on ——— alleged: (a) the informations did not state a public offence; (b) that the statute does not describe an offence; (c) that Sec. 103-51-2 C. L. Utah 1943, under which the informations are laid, violates the 5th Amendment to the federal Constitution; (d) that the informations deny the defendants their rights under the Treaty of Guadalupe Hidalgo; (e) that the informations violate the sixth Amendment to the federal Constitution; (f) and said motion was further generally based on "The Constitution of the United States (See R. 4). Motion denied.

3. All of these questions were raised by assignments of error on appeal (See Assignments Nos. 1, 4—this one

covered the 1st, 4th, 5th, 6th, 8th and 14th Amendments to the federal constitution—5, 8. This last assignment raised particularly the federal protection of due process, by attacking the Court's use of inference upon inference. All of these questions were discussed in appellants' brief. (See Appellants' Brief on Record, which contains also the assignments of error.)

WHEREFORE it is respectfully submitted that the appeal of the above entitled cause comes within the proper jurisdiction of the Supreme Court of the United States.

Dated this 6 day of February, 1945.

(S.) CLAUDE T. BARNES,
(S.) J. H. McKNIGHT,
(S.) KNOX PATTERSON,
(S.) ED. D. HATCH,
(S.) O. A. TANGREN,
Attorneys for Appellants.

APPENDIX

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 6737, 6738, 6739, 6740, 6741, 6742, 6743, 6744, 6745, 6746, 6747, 6748, 6749, 6750, 6751

THE STATE OF UTAH, Respondent,

v.

ALBERT EDMUND BARLOW, MORRIS QUINCY KUNZ, DAVID BRIGHAM DARGER, IANTHUS WINFORD BARLOW, DR. RULON CLARK ALLRED, OSWALD BRAINICH, EDMUND F. BARLOW, ARNOLD BOSS, HEBER KIMBALL CLEVELAND, LOUIS ALMA KELSCH, JOHN YATES BARLOW, JOSEPH WHITE MUSSER, JOSEPH LYMAN JESSUP, ALMA ADELBERT TIMPSON, CHARLES FREDERICK ZITTING, Appellants

McDONOUGH, *Justice:*

These cases all involve the same legal questions and, in substance, the same facts. They are consolidated for purposes of appeal.

Each of the defendants was charged with and convicted of the crime of unlawful cohabitation in violation of Sec. 103-51-2, U. C. A. 1943, which statute is a companion statute to Sec. 103-51-1 which prohibits the practice of polygamy. The trial in each case was based on a stipulation of facts tendered by each defendant and adopted by the district attorney.

Sec. 103-51-2, supra, reads:

> "If any person cohabits with more than one person of the opposite sex, such person is guilty of a felony.
>
> "Any person, except the defendant, may be compelled to testify in a prosecution for unlawful cohabitation; *provided, however,* that the evidence given in such prosecution shall not be used against him in any proceeding, civil or criminal, except for perjury in giving such testimony. A person so testifying shall not thereafter be liable to indictment, prosecution, or pun-

ishment for the offense concerning which such testimony was given."

One of the stipulations referred to—and they are all identical except for names and the dates when the acts were committed—is as follows:

> "That the said Albert Edmund Barlow on and between October 14, 1941, and the 1st day of March, A.D. 1944, at the County of Salt Lake, State of Utah, did cohabit with more than one person of the opposite sex, to-wit: With Amanda Kate Kilgrow, Vio Frazer, Marine Owen; and that said association was based on the belief of the said defendant and the women in the divinity of the Doctrine and the Covenants of the Church of Jesus Christ of Latter-day Saints (exclusive of the Manifesto). No testimony was offered concerning sexual intercourse of the defendant with said women."

On each separate appeal the same various errors are specified. The principal contentions and arguments of appellants are in substance that: (1) The statute, the information and the stipulation each fail to state the commission of any public offense, for the word "cohabit" is not defined, and nothing more than innocent association can be inferred. (2) The prosecution and conviction of each defendant constitutes a violation of the rights of religious freedom guaranteed by the First and Fourteenth Amendments to our Federal Constitution, and also by the Treaty of Guadalupe Hidalgo of 1848. (3) The stipulation of facts shows that the conduct of each defendant was based upon belief in the "Doctrine and Covenants" (exclusive of the Manifesto) of the Church of Jesus Christ of Latter-day Saints, and that there was therefore no criminal intent. (4) The inclusion of the "irrevocable ordinance" in Article III of the Constitution of Utah, whereby the practice of polygamy is prohibited, was the result of coercion by Congress and that said provision together with all legislation enacted thereunder was and is null and void. (5) The statute is unconstitutional in that more than one subject was included in the bill and that its subject is not

clearly expressed in its title. (6) The statute is special legislation and therefore void.

A brief review of a phase of the history of Utah and of some of the factors which brought about the legislation assailed should be of aid in the consideration of the contentions of defendants. The people of the Church of Jesus Christ of Latter-day Saints (for convenience called the "Mormon Church" hereinafter or the "church"), came to this area to escape persecution. Belief in what those people claimed to be divine revelations to Joseph Smith as a prophet, contained in part in the "Doctrine and Covenants", aroused a great deal of opposition. Section 132 of said Doctrine and Covenants as now published, is what is known as the "revelation on eternal marriage"; and in connection therewith appears the doctrine of "plural marriage", whereby a man might marry more than one woman if he obtained the consent of his wife and permission of the presiding officials of the church.

Whether or not such permissions were prerequisite to valid plural marriage in the eyes of the church, and whether appellants otherwise interpret the doctrine, we are not here concerned. We mention such conditions because of their bearing on the meaning and effect of the "Manifesto", hereinafter mentioned. In any event, the practice of polygamy among adherents of the Mormon faith in this territory was attacked not only by the non-Mormons of the region but by diverse groups elsewhere in this country. Agitation was widespread to bring about its suppression by law.

As a result Congress in 1862 enacted what became known as Sec. 5352 Rev. Stat. U. S. (12 Stat. 501):

> "Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years."

After some years of delay, some executive measures were adopted for the enforcement of this act in the territories.

In Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244, the defendant who was convicted under the foregoing statute proved "that he had received permission from the recognized authorities in said church to enter into polygamous marriage", and he contended that he believed it was his religious duty to practice polygamy and that he was therefore protected in such practice by the First Amendment to our Federal Constitution. His contention was rejected and his conviction affirmed. However, the United States Supreme Court in its opinion did not discuss the question of whether the act did or could relate to those who entered into polygamy prior to the enactment of the statute.

On March 22, 1882, the statute was amended, and there was added among other provisions, the following section prohibiting "unlawful cohabitation" (22 Stat. 31);

> "Sec. 3. That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than $300, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court."

Congress made it clear in 1887 when a proposed constitution for the State of Utah was submitted by the people here, that statehood would not be granted without some unequivocal constitutional provision prohibiting plural marriage. The proposed Constitution of 1887 prohibited polygamy, making its practice a misdemeanor. Various public officials urged church leaders to renounce sanction for plural marriage, but the church officials were evidently reluctant to entertain such counsel until the constitutionality of the measures enacted to stamp out polygamy had been thoroughly tested. On September 25, 1890, four months after The Late Corporation of the Church v. U. S., 136 U. S. 1, 34 L. Ed. 478, 10 S. Ct. 792, was decided, Wilford Woodruff, then president of the church issued an

"Official Declaration" commonly known as the "Manifesto", which declaration was approved by his associate counsellors and apostles. In that declaration it is stated:

> "We are not teaching polygamy or plural marriage, nor permitting any person to enter into its practice. * * *
>
> "Inasmuch as laws have been enacted by Congress forbidding plural marriages, which laws have been pronounced constitutional by the court of last resort, I hereby declare my intention to submit to those laws, and to use my influence with the members of the church over which I preside to have them do likewise.
>
> "* * * And I now publicly declare that my advice to the Latter-day Saints is to refrain from contracting any marriage forbidden by the law of the land.
>
> WILFORD WOODRUFF,
> *President of the Church of Jesus Christ of Latter-day Saints.*"

At a general conference of the church held on October 6, 1890, the following resoultion presented by Lorenzo Snow, one of the twelve apostles of the church, was unanimously adpoted by vote of the conference:

> "I move that, recognizing Wilford Woodruff as the president of the Church of Jesus Christ of Latter-day Saints, and the only man on the earth at the present time who holds the keys of the sealing ordinances, we consider him fully authorized by virtue of his position to issue the Manifesto which has been read in our hearing, and which is dated September 24th, 1890, and that as a church in general conference assembled, we accept his declaration concerning plural marriages as authoritative and binding."

On July 16, 1894, Congress passed the Enabling Act (28 Stat. 107) requiring, thereby, the inclusion in the State Constitution of the so-called "Irrevocable Ordinance"

which forever prohibits polygamous marriages. Such ordinance reads:

> "The following ordinance shall be irrevocable without the consent of the United States and the people of this State:
>
> " 'First:—Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.' " (Const., Art. III)

After the adoption of the Manifesto in 1890, steps were taken to enact in the Territory of Utah legislation similar in scope to the federal legislation. Over two years prior to the passage of the Enabling Act, the Territorial Legislature on February 4, 1892, enacted the following statute on unlawful cohabitation which remained substantially unchanged until 1935:

> "If any male person hereafter cohabits with more than one woman, he shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than $300, or by imprisonment in the county jail for not more than six months, or by both said punishments, in the discretion of the court."

On January 4, 1896, Utah became a state. The language of the 1892 territorial statute became a law of the State of Utah (Article XXIV, Sec. 2, Constitution of Utah) and said statute became Sec. 4209 of R. S. U. 1898, without any alteration in the meaning; and the same was continued in the various compilations and codes until incorporated into Sec. 103-51-2, R. S. U. 1933, in language almost identical with the original enactment in 1892. By Chap. 112, Laws of Utah, 1935, the latter statute was amended to read as hereinabove first set out.

With the foregoing as a background, we proceed to consider the contentions of appellants in the order in which

they are stated hereinabove. The first has to do with the meaning of the word "cohabit" as used in the statute, the information and the stipulation.

Subsequent to the enactment by Congress in 1882 of the statute making unlawful cohabitation a penal offense in territory within the exclusive jurisdiction of the United States, prosecutions and convictions followed in many cases in the Territory of Utah, a number of which reached the Territorial Supreme Court, among them United States v. Cannon, 4 Utah 122, 7 P. 369, and United States v. Musser, 4 Utah 153, 7 P. 389. The Cannon case was appealed to the United States Supreme Court. The decision in that court construed the statute, giving to the word "cohabit" therein the same meaning ascribed it by the territorial court. Cannon v. United States, 116 U. S. 55, 29 L. Ed. 561, 6 S. Ct. 278. However, in 118 U. S. 355, the United States Supreme Court having decided in Snow v. United States, 118 U. S. 346, 30 L. Ed. 207, that that court was without jurisdiction of the writ of error in such case set aside its decision theretofore rendered in the Cannon case. However, the dismissal of the writ in the United States Supreme Court left the decision of the Territorial Court unimpaired. Furthermore, the definition of the word "cohabit" given in that case is but the dictionary definition. The present Webster's International unabridged dictionary gives the following definition of "cohabit": "1. To dwell or abide in company. *Archaic.* 2. To dwell or live together as husband and wife . . . " For more than 60 years the word "cohabit" as used in the statutes has had the ordinary common meaning—to live together as husband and wife. When Congress adopted the statute above cited, it palpably did not have in mind the archaic definition applicable to some ancient literature or poetry, but the modern definition and meaning of the word. See cases cited in 7 Words and Phrases, Per. Ed. p. 554, et seq. Too, the observations made by the United States Supreme Court in construing the statute, while not authoritative as case law, are here pertinent: "The word is never used in its first (archaic) meaning, in a criminal statute; and its second meaning is that to which its use in this statute has relation. The context in which it is found, and the manifest evils which gave

rise to the special enactments in regard to 'cohabitation', require that the word should have the meaning which we have assigned to it. Bigamy and polygamy might fail of proof, for want of direct evidence of any marriage, but cohabitation with more than one woman, in the sense proved in this case, was susceptible of the proof here given; and it was such offense as was here proved that section 3 of the act was intended to reach—the exhibition of all the indicia of a marriage, a household, and a family, twice repeated." 116 U. S. 74-75.

In light of the foregoing, the contentions of appellants that the statute is so uncertain as to be meaningless and that the information charges no crime, cannot be sustained.

But appellants assert that though the information in each instance be held not uncertain in meaning because of the use of the word "cohabit" without adding the phrase "as man and wife" nevertheless it should be held fatally defective by reason of failure to supply sufficient facts. Appellants rely on State v. Jessup, 98 Utah 482, 100 P (2d) 969. The prosecution in the Jessup case was under the 1935 amendment, and it is true that we held that the information was defective for failure to allege the names of the person with whom the offense of unlawful cohabitation was allegedly committed. The information in that case merely charged that the defendant "did cohabit with more than one person of the opposite sex", without naming anyone. Assuming that what we said in that case was not modified by our decisions with respect to the sufficiency of an information in State v. Anderson, 100 Utah 468, 116 P. (2d) 398, and State v. Hill, 100 Utah 456, 116 P. (2d) 392, the defect complained of in the Jessup case does not appear in any of these cases now before us; for in each information the district attorney specifically named the women with whom the State alleged defendant had unlawfully cohabited during the period specified. The information in each of these cases sufficiently states the offense of unlawful cohabitation.

The assault upon the judgment of conviction based upon the contention that the stipulation of facts does not warrant a finding of guilty because the facts admitted do not show beyond a reasonable doubt that the statute in ques-

tion was violated, must likewise fail. The admission by each defendant that he cohabited with the several named women, was in effect a plea of guilty; unless the fact that such cohabitation was because of defendant's religious belief in its righteousness made them constitutionally immune from prosecution therefor. It is inconceivable that defendants supposed they were being criminally charged with dwelling in the same community with the named women; and that in making the admission referred to they merely admitted such fact. If any reasonable doubt could be entertained as to the fact admitted, it would be dispelled by the reason given in the stipulation for so associating with the women. Such association was stated by each of appellants to have been based upon his belief in the Doctrine and Covenants of the Church "exclusive of the Manifesto". The "Manifesto", as hereinabove shown, was a declaration of the Church disapproving plural marriage. Defendants' admitted cohabitation then was because of their disbelief in the declaration against plural marriage; and their belief in doctrines which, if such declaration were a nullity, would permit it. In asking this court to find a meaning of the stipulation other than that given it in the court below, appellants attribute to its membership a naivete, the possession of which we are unwilling to confirm.

We pass to a consideration of the argument that the prosecution and conviction of appellants was in violation of the right of religious freedom guaranteed by the First and Fourteenth Amendments of the Constitution of the United States. It is now well settled that the freedoms of the First Amendment are among the fundamental personal rights protected by the Fourteenth Amendment from impairment by the states. Murdock v. Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A. L. R. 81; Douglas v. Jeannette, 319 U. S. 157, 63 S. Ct. 877, 87 L. Ed. 1324; Jamison v. Texas, 318 U. S. 413, 63 S. Ct. 669, 87 L. Ed. 869; Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213; Schneider v. State, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155. If an act of Congress would be violative of the First Amendment the same legislation by a state would be in violation of the Fourteenth. The decisions of the United States Supreme Court as to whether a con-

gressional act similar to that here considered contravenes the First Amendment is therefore authoritative.

In Reynolds v. U. S., supra, in rejecting the same contention as that here made in a case involving conviction of polygamy, the United States Supreme Court said (98 U. S. 166-167):

> "In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? . . .
>
> "So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.
>
> "A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Here the accused knew he had been once married, and that his first wife was living. He also knew that his

second marriage was forbidden by law . . . Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law. The only defense of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion; it was still belief, and belief only.

". . . But when the offense consists of a positive act which is knowingly done, it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made. No case, we believe, can be found that has gone so far."

As pointed out in the Cannon case, supra, the statute herein involved was enacted in furtherance of the effort to stamp out bigamy and polygamy. The reasoning of the Reynolds case is, therefore, here applicable. Nor can it be argued that the Reynolds case in reasoning or result has been in any way modified by later cases dealing with constitutional inhibitions against legislation hampering one in the free exercise of his religious belief. As late as 1942 in the case of Murdock v. Pennsylvania, supra, wherein the United States Supreme Court set aside the conviction of petitioner for violating an ordinance of the City of Jeannette, Pennsylvania, on the ground that such ordinance, as applied to the activities of petitioner, was invalid as violative of his rights under the Fourteenth Amendment, that court said:

". . . Nor do we have presented any question as to the sincerity of petitioners in their religious beliefs and practices, however misguided they may be thought to be. Moreover, we do not intimate or suggest in respecting their sincerity that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment. Reynolds v. United States, 98 U. S. 145, 161-167; and Davis v. Beason, 133 U. S. 333, denied any such claims to the practice of polygamy and bigamy. Other claims may well arise which deserve the same fate."

The assignments to the effect that the statute is violative of the United States Constitution are without merit.

The contention of appellants that the Treaty of Guadaloupe Hidalgo, or their rights thereunder, were violated by enactment and enforcement of the statute is wholly untenable. The guarantee of religious freedom in that treaty relates to Mexican citizens during the limited period of time in which they could elect whether to remain Mexican citizens or become citizens of the United States. The Mormon pioneers who settled this region in 1847 before the treaty, were not Mexican citizens. They claimed to be American citizens and asserted rights as citizens of the United States. While on their westward trip, from among their numbers the Mormon Battalion was recruited in 1846 to fight against Mexico, and it participated in the conquest of this area. Certainly the Republic of Mexico had no interest in protecting the future interests of those who had aided in the conquest. Furthermore, the wording of the document is such as to leave no doubt that the purpose of the provision relied upon was to protect Mexican inhabitants of the territory until such time as they would come under the protection of the Constitution of the United States. Nor does it appear that any of the appellants were "Mexicans . . . within the territory aforesaid", in 1848. And clearly the treaty did not purport to deal with the relation between the United States and peoples who might thereafter come into territory then being ceded to this country. But all this aside, it is to be noted that Mexico at the time of entering into the treaty, prohibited plural marriage. That that country by protecting Mexicans in the free exercise of their religion intended to protect the practice of polygamy, though based on religious belief, is, to speak frankly, absurd.

The third assignment, as the assignments are numbered at the outset, relating to lack of criminal intent is sufficiently answered in the quotation, supra, from the Reynolds case. For the reason therein expressed such assignment of error is overruled.

Appellants' next contention that the provision against polygamy was incorporated into our State Constitution through duress and coercion of Congress and that in con-

sequence thereof such provision was *void ab initio,* is untenable. Generally, the consequences of duress are voidable only, not void. As a rule, in a transaction requiring mutual consent, if consent is obtained by coercion, the victim may either affirm or avoid the transaction, but he may not claim the benefits and escape the obligations. In view of the fact that that the Constitution was ratified as a whole, if appellants were to argue their contention to its logical conclusion they would have to claim that because of alleged duress as to one provision, the ratification of the Constitution was invalid, and that the basis for obtaining statehood never occurred. However, they do not and cannot challenge the validity of ratification a half century after it transpired.

But assuming that the people of the state could, on the ground of coercion avoid the "irrevocable ordinance" only; (1) that is the business of the people of the state and not of a faction or sect among them. And no attempt has been made to repeal the Constitutional provision forever prohibiting polygamy. Nor is such attempt likely. Furthermore, the mere repeal of such Constitutional provision would not preclude the legislature from making polygamy a crime. As stated in Reynolds v. U. S., supra:

> "* * * An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion."

The contention that the statute is special legislation is also without merit, for its provisions are applicable to all people in the State irrespective of race, color, social status, religious affiliation or non-affiliations. It is a general statute and applies to all persons alike who violate its provisions. It it true that it relates to certain specific acts only, but the same is true as to statutes which penalize burglary and other species of crime.

The contention that by changing the offense from a misdemeanor to a felony the defendants are subjected to cruel and unusual punishment is patently without merit.

Finally, it is contended that the statute under which they stand convicted is void because it violates Article VI, Sec. 23 of the Constitution of the State of Utah which declares that "no bill shall be passed containing more than one subject, which shall be clearly expressed in its title." They argue that the statute actually contains four subjects, only two of which are expressed in the title. The act, Chapter 112, Laws of Utah 1935, set out hereinabove as Sec. 103-51-2, U.C.A. 1943, was entitled: "An Act Amending Section 103-51-2, Revised Statutes 1933, Making Unlawful Cohabitation a Felony and Providing that All Persons Except the Defendant Must Testify in Proceedings Therefor."

The contention that the act is void because there is in the body of the act subject matter which is not clearly expressed in the title must fail. If there are severable parts in an act one or more of which are not clearly expressed in the title, and where the act would be complete and capable of being enforced with such provision or provisions eliminated, only those parts are void which are not so expressed in the title. Riggins v. District Court, 89 Utah 183, 51 P. (2d) 645. Here the portion of the act making cohabitation a felony is clearly severable from the other provisions. No other part of the statute was invoked in the trial of these cases, hence appellants have no standing to question their validity.

1. That they might perhaps do so, see Coyle v. Smith, 221 U. S. 559, 55 L. Ed. *853, 31 S. Ct. 688.*

On the other hand if two subjects, within the meaning of the Constitutional provision, are contained in the bill the legislation is invalid. *Edler v. Edwards, 34 Utah 13, 95 P. 367.* However, the contention that there is more than one subject in the act in question cannot be sustained. The decisions of this court announce the rule that the legislature may not include matters which are neither related nor germane to one subject; but that the constitutional provision is not to be applied so as to hamper the law-making

power in adopting comprehensive measures covering a whole subject, where matters included all have some direct connection with or relation to the principal subject treated; and that the constitutional provision should be so applied as to guard against the real evil which it was intended to prevent. Utah State Fair Association v. Green, 68 Utah 251, 249 P. 1016; Edler v. Edwards, supra; Martineau v. Crabbe, 46 Utah 327, 150 P. 301. See Crawford, Statutory Construction, Sec. 98, and Cooleys Constitutional Limitatoins (6th Ed.) p. 170, 171.

What is hereinabove said relative to the defendants having no standing to question the constitutionality of a severable though germane provision of an act where such provision was not invoked against them, answers a contention made in the briefs, but apparently abandoned during argument, that the act would compel a wife to testify against her husband contrary to the Constitution of the State of Utah. At the trial, neither the legal wife nor any purported wife of any defendant was called upon to testify.

We find no error in the record. The judgment of the trial court is, therefore, affirmed.

We Concur:

James H. Wolfe,
Chief Justice;
Martin M. Larson,
Justice;
Lester A. Wade,
Justice;
Abe W. Turner,
Justice.

(7135)

No. 1037

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

STATE OF UTAH,

Respondent.

vs.

ALBERT EDMUND BARLOW,
Utah Case No. 6737

Appellant.

MORRIS QUINCY KUNZ,
Utah Case No. 6738

Appellant.

DAVID BRIGHAM DARGER,
Utah Case No. 6739

Appellant.

IANTHUS WINFORD BARLOW,
Utah Case No. 6740

Appellant.

DR. RULON CLARK ALLRED,
Utah Case No. 6741

Appellant.

OSWALD BRAINICH,
Utah Case No. 6742

Appellant.

(CONTINUED ON SECOND PAGE OF COVER)

APPELLANTS' BRIEF OPPOSING RESPONDENT'S BRIEF TO DISMISS

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J. M. MCKNIGHT,
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(CONTINUED FROM FIRST PAGE OF COVER)

EDMUND F. BARLOW,
Utah Case No. 6743

Appellant.

ARNOLD BOSS,
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HEBER KIMBALL CLEVELAND,
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Appellant.

JOHN YATES BARLOW,
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JOSEPH WHITE MUSSER,
Utah Case No. 6748

Appellant.

JOSEPH LYMAN JESSUP,
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Utah Case No. 6750

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CHARLES FREDERICK ZITTING,
Utah Case No. 6751

Appellant.

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APPELLANTS' BRIEF OPPOSING RESPONDENT'S BRIEF TO DISMISS

To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Respondent's brief in support of its motion to dismiss the appeal is as ill-contrived in its reasoning as it is maladroit in its caption—it is headed "The Supreme Court of The State of Utah", as if that august body were the arbiter of the motion to dismiss the appeal, a corrigendum, by the way, that inveigles us with new theories of appellate jurisprudence. We should not thus be severe if the brief did not contain downright mis-statements that cannot be condoned on the ground of inadvertency. The ill-advised respondent has actually stated in its brief, that "Each appellant stipulated that the testimony of the

state would show that he did the very thing prohibited by the statute in the words of the statute".

That statement is false; and in order to establish its falsity, it is necessary to quote here: (a) the Utah statute on Unlawful cohabitation; (b) the stipulation as to what the State's testimony would show in each case. This we now do:

> "103-51-2—Unlawful Cohabitation. All persons Except Defendant Must Testify. If any person cohabits with more than one person of the opposite sex, such person is guilty of a felony.
>
> Any person, except the defendant, may be compelled to testify in a prosecution for unlawful cohabitation; provided, however, that the evidence given in such prosecution shall not be used against him in any proceeding, civil or criminal, except for perjury in giving such testimony. A person so testifying shall not thereafter be liable to indictment, prosecution, or punishment for the offense concerning which such testimony was given."

It will be noted that the qualifying word "unlawful" is used twice in the statute, thus proving that the legislature recognized what the Supreme Court of the State of Utah and the respondent here failed to comprehend, namely, that there are two kinds of cohabitation, one lawful, one unlawful.

Now let us examine the stipulation entered into by each defendant (with names different only) to escertain if there be one word in it consistent with the words "unlawful cohabitation". Here it is:

> "That the said Albert Edmund Barlow on and between October 14, 1941, and the 1st day of March, A. D. 1944, at the County of Salt Lake, State of Utah, did cohabit with more than one person of the opposite

> sex, to-wit: With Amanda Kate Kilgrow, Vio Frazer, Marine Owen; and that said association was based on the belief of the said defendant and the women in the divinity of the Doctrine and the Covenants of the Church of Jesus Christ of Latter-day Saints (exclusive of the Manifesto). *No testimony was offered concerning sexual intercourse of the defendant with said women."* (Italics ours)

It was in the failure of the Court to give the defendants the presumption of innocence that they were denied due process.

To say that each defendant stipulated that he "did the very thing prohibited by the statute and in the words of the statute" is a falsehood unforgivable, on the ground of either artlessness or unskillfulness; in fact such a misstatement descends to that region of wilful misrepresentation condemned by every judicial tribunal. It was the very fact, that their "association" was not "unlawful", not characterized by "sexual intercourse", that caused the defendants to sign the stipulation.

The respondent in its *naivette* has taken the position that there can be no cohabitation without sexual concourse, yet in the same breath it denies the teachings of the Doctrine and Covenants and the United Order there enjoined. To the pure all things are pure; to the respondent an assemblage of persons for religious worship and daily life is *ipso facto* debauchery, despite the fact that the stipulation says "there was no evidence of sexual intercourse".

This paralogism with respect to the word "cohabit" vitiated the judgment of the trial court, the opinion of the Supreme Court of the State of Utah, and the respondent's brief herein considered. The United States clearly recognizes that there are two kinds of cohabitation and

heads its statute on the subject "*Unlawful* Cohabitation" (Crim. Code Sec. 314, 18 U.S.C.A. Sec. 514); furthermore, the proof must show that it is of the unlawful kind in order to uphold conviction. Thus:

> "living together as husband and wife. *Ex parte Snow*, 7 S. Ct. 556, 120 U. S. 274, 30 L. Ed. 658.
>
> "holding out two women to the world as his wives". *Cannon v. U.S.*, 6 S. Ct. 278, 116 U.S. 55, 29 L. Ed. 561.

We do not find a single case, state or federal, in which the defendant was convicted without proof sufficient to show that the cohabitation was of the unlawful kind. It should be remembered that the stipulation herein is not a stipulation of facts but a stipulation concerning the state's testimony. The defendants denied it by pleas of "not guilty" and thus we are constrained to determine the sufficiency of the state's case. The court had no right to assume anything beyond the bare words of the state's testimony, and when there was nothing whatever to show that the cohabitation was of the unlawful type, it was bound under the due process clause to presume an innocent intentment. This it did not do: it found the defendants guilty and sentenced them to an aggregate of seventy-five years imprisonment! The Supreme Court of Utah adopted the same error, and that is why the defendants are seeking due process on further appeal.

The misconceptions of the respondent in its brief are so erroneous that we list them.

1.

It proceeds on the theory that the stipulated testimony in these cases shows the same facts as those established in Reynolds v. U.S. 98 U.S. 145, 25 L. Ed. 244, despite that bigamy, not unlawful cohabitation, was there involved.

2.

It then pursues this misconception further and assumes that the stipulation herein embraces all the facts shown in Davis v. Beason, 133 U.S. 333.

3.

It argues in effect that "polygamy" is shown by the stipulation whereas unlawful cohabitation is the charge and polygamy has nothing to do with it. Polygamy is a second marriage while a valid first marriage exists.

4.

The respondent ignores the full religious teachings on marriage and moralities contained in the Doctrine and Covenants mentioned in the stipulation. In that book it says (42:22):

> "Thou shalt love thy wife with all thy heart, and shalt cleave unto her and none else".

and (49:16):

> "Wherefore, it is lawful he should have one wife, and they twain shall be one flesh".

Yet respondent assumes that the reference to the Doctrine and Covenants in the stipulation is necessarily to polygamy. Again the guilty rather than innocent inference is indulged, and the defendants denied due process.

5.

Thus having assumed that all of the facts essential to a charge of polygamy are established here, despite the fact that polygamy is not involved, the respondent then says that the questions here involved are all formally passed on, and cites a number of inapplicable cases. Thus it de-

liberately cites Murphy v. Ramsey, 114 U.S. 15, and Late Corporation of the Church v. U. S., 136 U.S. 1, as if those cases on polygamy were applicable here. Following this misconception, the respondent attempts to mislead this Court into the belief that it has already sufficiently passed on the Utah unlawful cohabitation statute, the meaning of the word "cohabit" and all other pertinent matters. This subterfuge cannot be overlooked.

Even as late as 1940 the Supreme Court of Utah said on the very unlawful cohabitation statute herein considered (State v. Jessup, 98 Utah 482, 100 P 2d 969)

> "The definition of cohabitation given by our statute is so general that to limit the information to it, word for word, states no more than a class of crimes."
>
> "*Unlawful cohabitation is proved by facts showing a course of conduct that to all outward appearances convinces one that the parties are living together as man and wives.*" (Italics ours)

Here there was complete absence of such vital proof. The respondent here argues as though the defendants pleaded guilty. They did not plead guilty—they pleaded not guilty and the testimony of the state did not make a case. It could never have been held to be a case if the defendants had been given the presumption of innocence guaranteed by the Fourteenth Amendment.

The defendants contend that the unlawful cohabitation statute cannot be given the same construction as the polygamy statute; this for the pertinent reason that the alleged immorality of polygamy is not involved in the unlawful cohabitation statute. How may one say that because polygamy is not within the protection of the First Amendment, unlawful cohabitation, which can be established without any proof of multiple marriage, is likewise

beyond the protection of that amendment? This point has never been decided by the Supreme Court of the United States, a major reason why these cases present a substantial and vital question. Where in these cases is there any evidence of holding out as wives by any defendant as to any women? Here appears nothing more than a legal abstraction, a condition without implication of either immorality or plurality of wives.

All of the cases cited by respondent, including the Reynolds case, are pure dicta as far as a finding of immorality is concerned, and the Reynolds case involved bigamy not unlawful cohabitation. The discussion there of the morals of polygamy was not essential to the decision; it is pure *obiter dicta.*

The Supreme Court of the United States has never as far as we know passed on the legality of the unlawful cohabitation statute as violative of the First Amendment. The appeal in Cannon v. U.S., 116 U.S. 55, 6 S. Ct. 278, 29 L. Ed. 561, was dismissed because no federal question was involved, and Snow v. U. S. 6 S. Ct. 1059, 118 U.S. 346, 30 L. Ed. 207 was dismissed for the same reason.

So here for the first time a substantial and important question is raised not only concerning the denial of due process to the defendants but also the withholding from them of the protection of the First Amendment to the Constitution of the United States.

It is only reasonable and just, that there can be no violation of any unlawful cohabitation statute in any state unless some immoral condition or relationship be shown. To say otherwise were to deny the right of assemblage. The matter of polygamy and polygamous living has been held to supply that necessary element in the proof; but poly-

gamy is here not either charged in the complaint or mentioned in the testimony. It is held by the Courts, that in unlawful cohabitation cases there need be no proof of marriage; but there must be a holding out as man and wives to supply that necessary element of immorality. The word "wife" or "wives" is not in the testimony here; in fact immorality in any form is not in this record. The First Amendment must necessarily protect where facts are not shown establishing immorality. How broad is the discretion of the Supreme Court of the United States where it feels that any Constitutional right is being denied is shown in Hague v. C.I. O., 307 U.S. 496, 59 S. Ct. 945 (960) where it said:

> "Every question arising under the Constitution may, if properly raised in a State court, come ultimately to this Court for decision."

And again:

> ". . . . . Equally obvious is it that a *state may not unduly suppress free communication of views*, religious or other, under the guise of conserving desirable conditions. *Here we have* a situation analogous to *a conviction under a statute sweeping in a great variety of conduct under a general and indefinite* characterization, and *leaving* to the executive and judicial branches *too wide a discretion in its application.*"
>
> *Cantwell vs. State of Connecticut*, 310 U. S. 296, 60 S. Ct. 900 (903) (Italics inserted)

Upon the application of the 5th Amendment against a State that in charging a defendant failed to state the "nature and cause of the accusation", see:—

> "The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth

Amendment . . . just as that in the Fifth . . . has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny. The instruments of such governments were, in the main, two: Conduct innocent when engaged in, was subsequently made by fiat criminally punishable without legislation. And a liberty loving people won the principle that criminal punishments could not be inflicted save that which proper legislative action had already "by the law of the land" forbidden when done. But even more was needed. From the popular hatred and abhorence of illegal confinement, torture and extortion of confessions of violations of the "law of the land" evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law *until there had been a charge fairly made* and fairly tried in a public tribunal free of passion, prejudice, excitement and tyrannical power. Thus, an assurance against ancient evils, our country, in order to preserve "the blessings of liberty", wrote into its basic law the requirement, among others, that *the forfeiture of the lives, liberty and property of people accused of crime can only follow if procedural safeguards of due process have been obeyed.*

The determination to preserve an accused rights to *procedural due process* sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial *processes.* . . . . . And they who have suffered most from secret and

dictatorial proceedings have always been the poor, the numerically weak, the friendless, and the powerless.

(4) *This requirement . . . of conforming to fundamental standards of procedure in criminal trials . . .* was made *operative* against the states by the Fourteenth Amendment. . . ."

Chambers v. Florida, 309 U.S. 227, 60 S. Ct. 472, at pp. 476-478. (Italics inserted)

Here the 5th Amendment, by indirection, is brought into the 14th.

If it shall be contended that the Utah statute against unlawful cohabitation may be enforced in the absence of the proof of any immorality, then that statute certainly is void as being in direct violation of the First Amendment guaranteeing freedom of assembly; and the general welfare declaration of the Constitution,:—"establish justice, —and secure the Blessings of Liberty to ourselves and our Posterity".

If that be the contention of the State, it is advocating the worst possible form of tyranny and injustice.

This Honorable Court, in the Cannon case, supra, has very carefully said that such cannot be with respect to the Federal statute prohibiting unlawful cohabitation in the Territory of Utah,;—

"What, then, was the object of Congress in enacting this statute? It was, judging from the whole act, intended to be an aid in breaking up polygamy *and the pretenses thereof.* . . . We find nothing whatever in the language or context to lead us to believe that Congress meant to apply the statute to lewd and lascivious cohabitation."

Now, then: The "pretenses" of polygamy consist in the holding out of women as wives, the apparent polygamous relationship, in the absence of which *in the proof*, no purpose is made out for the Act. This is the import and clear declaration of every case we have been able to find directly bearing on the matter.

Some form of illegality, besides a mere legislative declaration of a ban on a living status, must appear, in the pleading and in the proof, else the statute is void as beyond the police power of either State or Nation.

This Court has said, as above, that at least two forms of such illegality are those things at which the preceding Federal statute was directed, viz: either polygamy, or "the pretenses of" polygamy, and has classified polygamy as immoral, so giving constitutionality to the former Act. Without that clause "and the pretenses thereof" the Federal Act would have fallen.

Even considering the dicta in the cases, we can find no support for this statute. There being nothing in the record here, either in the information or the stipulation showing any "pretense" of a polygamous relationship; there being a like dearth of any pleading or showing of a polygamous relationship itself, this series of convictions must fall.

Unless these cases be heard and reversed, an instrumentality of the most obnoxious oppression will have been given sanction, forming a basis for other and like destructions of all of the freedoms assured under the 1st and 14th Amendments.

The cases cited by the State cannot show any reason why these cases should not be heard. They indicate that they must be examined, as involving the necessary de-

termination of rights never before presented to this Court.

Let us assume, for the purposes of this following argument only, that polygamy is an adjudicated immorality, and in that light examine the cohabitation cases:

It inescapably follows that it is the immorality of polygamy which takes that practice out of the protection of the First Amendment.

In the absence of any pleading or proof showing that a cohabitation was, in fact, tinged with the polygamous "pretense" or that of apparent husband and wives relationship, application to such charges must have no force.

So, for that exception to the protection of the First Amendment to be urged, some showing of either: polygamy actually practiced, or some "pretense" of polygamy, one or the other, must appear in both the charge and the proof—in the evidence. Neither is present. No proof of any immorality here appears in the record in its entirety, or in any particular.

A cohabitation practiced under a sincere religious belief, with no showing of any *mala fides*, has the benefit of the complete protection of both the First and the Fourteenth Amendments. Such is the case here.

Such is here presented for the first time to this Honorable Court. No prior decisions have so much as hinted at any determination of this matter. This is a substantial and fundamental right of every citizen. The rights of every citizen are inescapably affected by the decision here.

That we have not misstated the law as declared by the courts let us cite the following:

> "It was such offense that Sec. 3 of the Act was intended to reach, *the exhibition of ALL the indicia* of

marriage; *a household and a family, twice repeated.*"

Cannon v. United States. (Supra) 116 U.S. 75.

"It is assigned as error that the court told the jury that "the law aims at the wrongful example of an apparent as well as an actual polygamous relation, without reference to what actually occurs with his plural or polygamous wives." . . . A man cannot *DISPLAY all the indicia of a married life,* and yet plead its non existence successfully."

United States v. Peay, 5 Utah 263 342 14 Pac. at p. 345. (Italics inserted)

The court in the Peay case, at pp. 343-345, recites the specific evidence upon which it thereafter therein holds the same to be sufficient to sustain the verdict of guilty.

Further, the court says:

"The following extract from the charge of the court is assigned as error: "But, *when you come to the proof of cohabitation with the illegal wife,* it requires proof of the fact. *The presumption would be against it,* to commence with. The presumptions of the law are in favor of innocence, and *until some evidence has been given tending to show these acts* of cohabitation on his part, the presumption would be that he didn't do that; but where it is shown these acts of cohabitation have taken place with the plural wives, if shown beyond a reasonable doubt, then it is a cohabitation within the meaning of the law." (Italics ours)

That instruction is there upheld as a proper statement of the law, and as not tending to imply the guilt of the defendant or to alter the rule of "presumption of innocence".

See *Peay case,* supra, 14 P. at p. 345-6.

"The term 'cohabit', as found in the criminal codes of many of the states, is coupled with and qualified

by the adverbs 'lewdly', 'lasciviously', 'adulterously', or some other equivalent expression. No such word or expression is found in the section under consideration, or in the act of which it is a part. As defined by lexicographers, 'cohabit' means to dwell with or reside together. *It may mean* residing in the same country, city, or neighborhood, or in the same family, or the dwelling together in lawful wedlock. This would be lawful cohabitation. *Or it may mean* the dwelling of a man and woman together ostensibly and apparently in wedlock, when, in fact or in law, no marriage exists; and without proof of adultery or fornication, this would be unlawful cohabitation. *Or it may mean* the living together of a man and woman, without lawful marriage, in the practice of fornication or adultery. . . . The ideas which accompany the use of the word determine its import. . . . It is a word of flexible signification."

"The end of the law was the protection of the monogamous marriage; and the suppression of polygamy and unlawful cohabitation were but means to that end. . . . Congress therefore forbade plural marriage *in appearance* only, as well as in form, and by the example of punishment it doubtless intended to erradicate the example of *apparent plural marriages*, as well as the plural marriages in form."

"The defendant also insists that the evidence before the jury did not prove him guilty. This raises a question of fact: to determine which it is necessary to examine the evidence."

"*The offence of the defendant consisted in dwelling with* the women in the habit and repute of marriage, holding that relationship out to the world *by his language and conduct*, or by expressions and conduct, for which he was responsible. . . . *The question is, what relationship existed between the defendant* and these women? Was the defendant there as a guest?

> As a border? Was he the proprietor of the house, and the women in his employ as servants,—chambermaids or cooks? Were they his sisters? Was one of them his mother? Or were they there as his wives?"
>
> *United States v. Musser*, 4 Utah 153, 7 Pac. 389.

The court then concludes that the evidence: the showing of marriages; the children of each woman attending the same school and giving the surnames, respectively, of the defendant, with different mothers; the payment by one of the "wives" of the charges of the school-master; the residence of the same school-master in the home of the defendant, and his testimony as to the family relationships there, etc., etc., *was a sufficient showing of the necessary matters of fact*, from which *the answer to the question of fact* enumerated might properly be made.

Despite the allusion of the respondent the practice of polygamy is not referred to in either the information or the stipulation. It is true, that the lower courts treated these cases as if that fact or its "pretense" had been shown. Such treatment of these charges and evidence cannot be sustained on any tenable hypothesis.

Unlawful cohabitation cannot be polygamy. It has been declared by every decision not to be polygamy in fact, but the "pretense" of the real thing. Those cases all assert that the *semblance*, the *holding out* to the world, the *apparent* state of plural marriage must be established by evidence, not by inference, to sustain conviction on charges of this nature. There is no dissent from all these interpretations of the Utah Statute. Polygamy and unlawful cohabitation under the Utah statute cannot be regarded as synonymous terms when all the cases differentiate them. Cohabitation is unlawful only when it has the pretense of polygamy; and to say that no facts need be shown to ex-

plain cohabitation is to convict without testimony and deny due process. The protection of the First Amendment when applied to such facts has never before been presented to this Honorable Court.

Even the Justice who wrote the decision in this case below has since that time apparently recognized that reading into the word "cohabit" an unlawful meaning not there is a malapropism, for in an opinion rendered in M. S. Tel. & Tel. Co. v. P. Util. Com., 155 P. 2nd 184 (Jan. 9, 1945), he said:

> "We therefore address ourselves to its meaning, keeping in mind one of the cardinal rules of statutory construction, viz., that the interpretation must be based on the language used, and that the Court has no power to re-write a statute to make it conform to an intention not expressed."

The Courts below have ignored the fact that those rights here asserted by appellants under the Treaty of Guadalupe Hidalgo have likewise never before been presented to or passed upon by this Honorable Court.

This matter seems to have received, as our soldiers say, "the brush-off". We believe such to be serious and ill-advised.

That Treaty provides, inter alia, as follows:

> "Art. IX. The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, comformably with what is stipulated in the preceding article,shall be incorporated into the Union of the United States and be admitted, at the proper time, (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution; *and in the meantime shall be maintained and protected in the free*

enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction."

The Protocol of May 6th, 1848, between the Commissioners of the United States and the Minister of Foreign Affairs of the Republic of Mexico, at Queretaro, provides as follows:

"1st. *The American Government* by suppressing the IXth article of the treaty of Guadalupe Hidalgo and substituting the III article of the Treaty of Louisiana, *did not intend to diminish in any way* what was agreed upon by the aforesaid article IXth *in favor of the inhabitants* of the territories ceded by Mexico. Its understanding is *that all of that agreement is contained* in the 3d article of the Treaty of Louisiana. In consequence *all the privileges and guarantees, civil, political and religious,* which would have been possessed by the inhabitants of the ceded territories, if the IXth article of the treaty had been retained, *will be enjoyed by them, without any difference,* under the article which has been substituted."

And the Gadsen Treaty of 1854, recited:

"Art. V. All the provisions of the Eighth and *Ninth,* Sixteenth and Seventeenth Articles of the Treaty of Guadalupe Hidalgo shall apply to the Territory ceded by the Mexican Republic in the First Article of the Present Treaty, *and all the rights of Persons and property both civil and ecclesiastical within the same,* as fully and effectively as if the said Article were herein again recited and set forth."

The matter of *property rights* under these treaties has frequently been before the courts of the United States, notably in the following cases:

Ely v. U.S., 171 U.S. 220.
Cessna v. U.S., (1898) 169 U.S. 165.

Tripp v. Spring, (1878) 5 Sawy. (U.S.) 209, holding:

"The obligation which the United States assumed by the Treaty with Mexico was *to protect all rights of property acquired under the laws of that country.* * * *"

San Francisco v. LeRoy (1891) 138 U.S. 671.
Townsend v. Greeley, 5 Wall. (U.S.) 326.
Astriasaran v. Santa Rita Land, etc., Co. (1893), 148 U.S. 80.

"For it is equally well settled that when the *United States acquired California from Mexico by the treaty of Guadalupe Hidalgo*—they were bound under the eighth article of that treaty *to protect all rights of property in that territory emanating from the Mexican government PREVIOUS TO THE TREATY.*"

Knight v. U.S. Land Assoc. (1891), 142 U.S. 162.

See also:

U.S. v. Chaves, 159 U.S. 452.

We have not found a single case in which the religious rights guaranteed by this Treaty have been passed upon.

Clearly this case supports the propositions:

(a) That the immorality attendant upon the actual practice of polygamy must be shown as apparent, and as held out to the world by acts, doings, etc., of the defendant and for which he was responsible, before the unlawful cohabitation statute of Territorial Utah could be applied, where polygamy was being sought to be suppressed.

(b) That, in the absence of evidence received on the trial before the jury showing the apparent marital relationship *as a matter of fact proved beyond reasonable doubt* by the evidence, the presumption of innocence must prevail.

We cite no more such cases, as we say that no case can be cited holding contrary to those now quoted from above.

No matter which horn of this matter now before the Court be taken hold of, the result is inescapably the same: The cases must be here reviewed. The convictions must be reversed.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1037

ALBERT EDMUND BARLOW, MORRIS QUINCY KUNZ, DAVID BRIGHAM DARGER, ET AL.,
Appellants,

vs.

THE STATE OF UTAH

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

GROVER A. GILES,
Attorney General of Utah;
W. STANFORD WAGSTAFF,
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BRIGHAM E. ROBERTS,
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Counsel for Appellee.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1037

ALBERT EDMUND BARLOW, MORRIS QUINCY KUNZ, DAVID BRIGHAM DARGER, IANTHUS WINFORD BARLOW, DR. RULON CLARK ALLRED, OSWALD BRAINICH, EDMUND F. BARLOW, ARNOLD BOSS, HEBER KIMBALL CLEVELAND, LOUIS ALMA KELSCH, JOHN YATES BARLOW, JOSEPH WHITE MUSSER, JOSEPH LYMAN JESSUP, ALMA ADELBERT TIMPSON, CHARLES FREDERICK ZITTING, *Appellants,*

vs.

THE STATE OF UTAH

STATEMENT AGAINST JURISDICTION

In compliance with Rule 12, paragraph 2, of the Supreme Court of the United States the appellee herein presents its statement disclosing matters and grounds making against the jurisdiction of the Supreme Court of the United States asserted by the appellants and supporting its motion to dismiss the appeal herein.

The Federal Questions Asserted by Appellants Are Not Substantial

It is well established that in order for the Supreme Court of the United States to acquire jurisdiction of a case on appeal the Federal question involved must be substantial. If it is not substantial a motion to dismiss the appeal should be granted.

One Federal question asserted by appellants is that Section 103-51-2, Utah Code Annotated 1943, is unconstitutional as applied to the appellants because it denies to them their religious freedom secured to them by the First and Fourteenth Amendments of the Constitution of the United States.

Religious freedom of the First Amendment is protected by the Fourteenth Amendment from impairment by the States. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A. L. R. 81. If an Act of Congress would be in violation of the First Amendment, the same legislation by a State would be in violation of the Fourteenth Amendment. Decisions of the United States Supreme Court as to whether a congressional act similar to said Section 103-51-2 is in violation of the First Amendment is authoritative where it is asserted that said Section 103-51-2 is in violation of the Fourteenth Amendment.

In *Reynolds* v. *U. S.,* 98 U. S. 145, 25 L. Ed. 244, the Supreme Court considered the validity of a statute prohibiting polygamy where it was asserted to be in violation of the First Amendment. Said section 103-51-2 was enacted in furtherance of the effect to stamp out polygamy and the reasoning of the *Reynolds* case is applicable to this statute. In that case the Supreme Court stated:

> "In our opinion, the statute immediately under consideration is within the legislative power of Congress.

It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.''

In *Davis* v. *Beason,* 133 U. S. 333, the Supreme Court again had occasion to consider the First Amendment in connection with a statute which in effect prohibited a person from voting who was a polygamist or who belonged to any order, organization or association which taught, advised, counseled, or encouraged its members or any one to practice

polygamy. It was held that the statute did not violate the First Amendment and the Court stated:

> "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases."

The court also states:

> "It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes as prompted by the passions of their members. And

history discloses the fact that the necessity of human sacrifices on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious beliefs, their supporters could be protected in their exercise by the Constitution of the United States. Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government, for acts recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance."

The court quoted from *Murphy* v. *Ramsey*, 114 U. S. 15, as follows:

> "Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony—the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this Act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment."

In concluding its consideration of this religious problem, the court stated:

> "It is assumed by counsel of the petitioner that, because no mode of worship can be established or re-

ligious tenets enforced in this country, therefore any form of worship may be followed and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practicing them. But nothing is farther from the truth. Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religion."

In the *Late Corporation of the Church of Jesus Christ of Latter-day Saints* v. *United States*, 136 U. S. 1, the court stated:

"One pretense for this obstinate course is, that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and therefore under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical plea. No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority.

The state has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced."

The *Reynolds* and *Beason* cases were cited as recently as May 3, 1943, by the Supreme Court of the United States

in the case of *Murdock* v. *Pennsylvania,* 319 U. S. 105, wherein it was said:

> "Moreover, we do not intimate or suggest in respecting their sincerity that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment. Reynolds v. United States, 98 U. S. 145, 161-167, and Davis v. Beason, 133 U. S. 333 denied any such claim to the practice of polygamy and bigamy. Other claims may well arise which deserve the same fate."

The foregoing cases have set at rest the assertion made by appellants herein that said Section 103-51-2 violates the First and Fourteenth Amendments. Where the Supreme Court of the United States has so decided an asserted Federal question it is no longer substantial and the said court does not have jurisdiction. *Leonard* v. *Vicksburg, Shreveport & Pacific Railroad Company,* 198 U. S. 416, 25 S. Ct. 750, 49 L. Ed. 1108; *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Merrick Co.,* 254 U. S. 376, 41 S. Ct. 142, 65 L. Ed. 312; *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, 53 S. Ct. 549, 77 L. Ed. 1062.

In this latter case the problem involved was whether or not a substantial Federal question was presented in determining the jurisdiction of a Federal District Court. The Supreme Court stated:

> "And the Federal question averred may be plainly unsubstantial either because obviously without merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."

The Court concluded:

> "It follows that the Federal District Court was without jurisdiction because the Federal question presented

was plainly unsubstantial since it had, prior to the filing of the bill, been foreclosed by the two previous decisions last named, and was no longer the subject of controversy."

We submit that there is no substantial Federal question involved here so far as a violation of the First and Fourteenth Amendments by said Section 103-51-2 is concerned.

Appellants assert the invalidity of said Section 103-51-2 by reason of Article 9 of the Treaty of Guadalupe Hidalgo.

The Supreme Court of Utah held that this treaty was not applicable to appellants. The treaty only purports to apply to "Mexicans—in the territories aforesaid," and it does not appear that the appellants or any of them were Mexicans in the territories aforesaid. In any event the language of this treaty with relation to the free exercise of religion is the same as the First Amendment and the cases heretofore cited and quoted construing said Amendment are also conclusive on this question.

It is to be noted that the Supreme Court of Utah did not hold that said treaty was invalid, and only when a treaty is declared invalid can the Supreme Court of the United States acquire jurisdiction on appeal from a State court. See Vol. 1 Ohlinger's Federal Practice, page 831, *et seq.*; *Ireland* v. *Woods*, 246 U. S. 323, 38 S. Ct. 319, 62 L. Ed. 745; *Schoff* v. *Famechon Co.*, 258 U. S. 76, 42 S. Ct. 189, 66 L. Ed. 472; *Erie R. Co.* v. *Hamilton*, 248 U. S. 369, 39 S. Ct. 95, 63 L. Ed. 307.

The remaining grounds relied upon by appellants as giving the Supreme Court of the United States jurisdiction on appeal are that they were denied due process of law and the equal protection of the law as secured to them by the Fourteenth Amendment to the Constitution of the United States. (The Fourth, Fifth and Sixth Amendments do not secure to appellants protection against acts of the State Government.)

Appellants' specific claims are not clear from their Statement of Jurisdiction. They assert that they were denied the presumption of innocence and that their convictions were based upon inferences based upon inference. This assertion lacks all color of merit and has no substance or foundation.

Section 103-51-2, Utah Code Annotated, 1943, makes it unlawful for any person to cohabit with more than one person of the opposite sex. By information each of the appellants, who are males, was charged with cohabiting with more than one woman. Each appellant pleaded not guilty. The trial of each appellant was had upon a stipulation which stated that the testimony of the State of Utah would be to the effect that each appellant cohabited with more than one woman. Dates, venue and names of the women were contained in each stipulation. It is to be noted that these stipulations were in the words of the said statute. The word, "cohabit" has a well defined meaning, i. e., the living or dwelling together as husband and wife. See Opinion of the Supreme Court of Utah herein, *United States* v. *Cannon*, 4 Utah 122, 7 P. 369; *Cannon* v. *United States*, 116 U. S. 55, 6 S. Ct. 278, 29 L. Ed. 561.

Upon this stipulation each case was submitted to the trial court, and that court found each appellant guilty as charged. We submit that upon the stipulation presented no other result could be reached. Each appellant stipulated that the testimony of the State would show that he did the very thing prohibited by the statute and in the words of the statute. How there was a denial of the presumption of innocence or a conviction by an inference based upon an inference we are at a loss to see. Such a contention is frivolous, without merit and has no substance or foundation. Such a contention will not give the Supreme Court of the United States jurisdiction. *Re Spies*, 123 U. S. 131, 8 S. Ct. 22, 31 L. Ed. 80; *Re Boardman*, 169 U. S. 39, 18 S. Ct. 29,

42 L. Ed. 653; *Wabash R. Co.* v. *Flannigan,* 192 U. S. 29, 24 S. Ct. 224, 48 L. Ed. 328; *Swafford* v. *Templeton,* 185 U. S. 487, 22 S. Ct. 783, 46 L. Ed. 1005; *Seaboard Air Lines R. Co.* v. *Padgett,* 236 U. S. 668, 35 S. Ct. 481, 59 L. Ed. 777; *Levering & Garrigues Co.* v. *Morrin, supra.*

The cases cited by appellants are not in point and are not helpful. For instance, in *Howard* v. *Fleming,* 191 U. S. 126, 48 L. Ed. 121, the only reference to presumption of innocence is found in the following quotation:

> • • • the omission in a state trial of any reference to the presumption of innocence cannot be regarded as a denial of due process."

In *McFarland* v. *American Sugar Refining Co.,* 241 79, 36 S. Ct. 498, 60 L. Ed. 899; *Tot* v. *United States,* 319 U. S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519, *Mobile R. Co.* v. *Turnipseed,* 219 U. S. 35, 31 S. Ct. 136, statutes were involved which provided that proof of one fact should be presumptive or *prima facie* evidence of another fact. The Court merely made an application in each case of the rule that there must be a rational connection between the facts proved and the facts presumed therefrom in order that the statutes comply with due process. In *Chambers* v. *Florida,* 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716, the use of an involuntary confession as a denial of due process was involved. In *Powell* v. *Alabama,* 287 U. S. 45, 53 S. Ct. 55, 84 A. L. R. 527, failure to furnish counsel to defendants in criminal cases as a denial of due process was involved.

We submit that there is no substantial Federal question here involved and that the appeal should be dismissed for lack of jurisdiction.

Respectfully submitted,

GROVER A. GILES,
W. S. WAGSTAFF,
BRIGHAM E. ROBERTS,
Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1037

ALBERT EDMUND BARLOW, MORRIS QUINCY KUNZ, DAVID BRIGHAM DARGER, IANTHUS WINFORD BARLOW, DR. RULON CLARK ALLRED, OSWALD BRAINICH, EDMUND F. BARLOW, ARNOLD BOSS, HEBER KIMBALL CLEVELAND, LOUIS ALMA KELSCH, JOHN YATES BARLOW, JOSEPH WHITE MUSSER, JOSEPH LYMAN JESSUP, ALMA ADELBERT TIMPSON, CHARLES FREDERICK ZITTING,

Appellants

vs.

STATE OF UTAH

MOTION TO DISMISS APPEAL

Comes now the appellee in the above entitled matter and respectfully moves the Court to dismiss the appeal of the appellants and each of them upon the following grounds, to-wit:

1. That there is no substantial Federal question involved in said appeal.

2. That said statement as to jurisdiction and the assignment of errors do not state grounds sufficient to give the Supreme Court of the United States jurisdiction of this appeal.

Dated this 19th day of February, A. D. 1945.

GROVER A. GILES,
W. S. WAGSTAFF,
BRIGHAM E. ROBERTS,
Attorneys for Appellee.

(7136)

No. 1037

Office - Supreme Court, U
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

STATE OF UTAH,

Respondent.

vs.

ALBERT EDMUND BARLOW,
Utah Case No. 6737

Appellant.

MORRIS QUINCY KUNZ,
Utah Case No. 6738

Appellant.

DAVID BRIGHAM DARGER,
Utah Case No. 6739

Appellant.

IANTHUS WINFORD BARLOW,
Utah Case No. 6740

Appellant.

DR. RULON CLARK ALLRED,
Utah Case No. 6741

Appellant.

OSWALD BRAINICH,
Utah Case No. 6742

Appellant.

(CONTINUED ON SECOND PAGE OF COVER)

PETITION FOR REHEARING

CLAUDE T. BARNES,
J. H. MCKNIGHT,
KNOX PATTERSON,
ED. D. HATCH,
O. A. TANGREN,
Counsel for Appellants.

(CONTINUED FROM FIRST PAGE OF COVER)

EDMUND F. BARLOW,
Utah Case No. 6743

Appellant.

ARNOLD BOSS,
Utah Case No. 6744

Appellant.

HEBER KIMBALL CLEVELAND,
Utah Case No. 6745

Appellant.

LOUIS ALMA KELSCH,
Utah Case No. 6746

Appellant.

JOHN YATES BARLOW,
Utah Case No. 6747

Appellant.

JOSEPH WHITE MUSSER,
Utah Case No. 6748

Appellant.

JOSEPH LYMAN JESSUP,
Utah Case No. 6749

Appellant.

ALMA ADELBERT TIMPSON,
Utah Case No. 6750

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CHARLES FREDERICK ZITTING,
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Appellant.

PETITION FOR REHEARING

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Notwithstanding our profound respect for this ultimate Court, we are duty bound to indicate that somehow, in dismissing this appeal, the Court has overlooked our most important point—the necessity of evidence to overcome a presumption of innocence, and a denial of due process where that rule is ignored. We blame ourselves for not being so explicit as our sincere conviction warranted.

The Court has evidently decided this matter under the theory that the defendants maintained that religious belief is a defense to a state statutory crime; but the defense

here is not that—it is that the State neither alleged, nor proved, a crime; on the contrary, it ignored a presumption of innocence and inferred a guilty intendment in the use of the word "cohabit" in the stipulation, all in denial of due process under the Fourteenth Amendment. The defendants have never claimed that they had a right to practice plural marriage, or unlawful cohabitation because of their religious belief; their claim in this case is that there was *no evidence* to show that they did *anything* wrong.

All that we have to work on is the brief order of this Court, as follows:

> "*Per Curiam*: The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. Davis v. Beason, 133 U. S. 333. Reynolds v. United States, 98 U. S. 145."

Now, it is not for us to say that the Court should give counsel the benefit of its reasoning in denying jurisdiction; but such would be most helpful in determining the basis for a petition for rehearing. Relying on the few words of the order of dismissal, we are compelled to believe, therefore, that it is founded on the Reynolds and the Davis cases. If that be so, the decision not to take jurisdiction is erroneous because those cases decided only that religious belief is no defense to a state crime. Here no crime was established, if the right of presumptive innocence be adhered to; and the religious belief of the defendants is not germane. The sole question is: Did the evidence show that they committed a crime? If not, they have been denied their right to due process under the 14th Amendment.

The gist of defendants' contention is set forth on page 4 of the STATEMENT AS TO JURISDICTION. We quote:

> "The appellants, throughout the cause, had a right to due process of law as set forth in the 1st, 5th, 6th

and 14th Amendments to the Federal Constitution, and it is here maintained that a presumption of innocence in an accused is one of the basic principles of the law of the land. The judgment of the lower court, and that of the Supreme Court of Utah, presumed that the word 'cohabit' as set forth in the stipulation had only *one* meaning, to-wit a guilty one as used in both the statute and the stipulations; whereas, in truth, the word is equally one of innocent import, standing alone without proof."

That was the defendants' case—"standing alone without proof".

This appeal was to decide whether evidence was required to overcome presumption of innocence as guaranteed by the due process clause; but the Court, apparently, has taken the view that it is an appeal on religion as a defense.

We concede, and we have all along conceded, that both the Reynolds case and the Davis case might apply where proof in the record showed the commission of a like crime. No such proof is in this record.

We say, therefore, the defendants have, through this oversight, been denied their appeal. We consequently not only petition for a rehearing, but also for such a withholding of mandate of *procedendo* as this Court may deem advisable.

Respectfully submitted,

CLAUDE T. BARNES,
J. H. MCKNIGHT,
KNOX PATTERSON,
ED. D. HATCH,
O. A. TANGREN,
Counsel for Appellants.

We respectfully certify that this petition for a rehearing is presented in good faith and not for delay.

CLAUDE T. BARNES,
J. H. MCKNIGHT,
KNOX PATTERSON,
ED. D. HATCH,
O. A. TANGREN,
Counsel for Appellants.

No. 1037. BARLOW ET AL. *v.* UTAH. Appeal from the Supreme Court of Utah. April 2, 1945. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Davis* v. *Beason,* 133 U. S. 333; *Reynolds* v. *United States,* 98 U. S. 145. *Messrs. Claude T. Barnes* and *O. A. Tangren* for appellants. *Grover A. Giles,* Attorney General, for appellee. Reported below: 153 P. 2d 647.

END OF CASE